

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LESLIE ELLIS THOMAS, on behalf of himself
and all others similarly situated,

Plaintiff,

VS.

VERIFIRST BACKGROUND SCREENING, LLC;
TRANSUNION, LLC,

Defendants.

Case No. 2:11-cv-02461-PD

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE A SUR-REPLY**

Defendants, TransUnion LLC and Verifirst Background Screening, LLC (“Defendants”), hereby respond as follows to Plaintiff’s “Motion for Leave to File a Sur-Reply Memorandum of Law in Opposition to Defendants’ Reply in Further Support of Their Motion to Dismiss Plaintiff’s Complaint” (the “Motion”). Defendants oppose Plaintiff’s Motion because it relies, in part, on an originally-pleaded, but dismissed, claim for injunctive relief, and thereby violates the parties’ stipulation as well as this Court’s May 28, 2011 Order approving the dismissal of that claim. (See Dkt. 25.) Further, the Motion was filed without leave of Court or any prior meet-and-confer with counsel.

Moreover, the arguments presented in Plaintiff's proposed sur-reply are meritless for the following reasons:

- Defendants’ Motion to Dismiss does not make a facial challenge to the constitutionality of the Fair Credit Reporting Act (“FCRA”). Rather, Defendants

seek dismissal of the claim as alleged in the Complaint on the grounds that it seeks to apply an interpretation of the FCRA that would be unconstitutional.

- As explained in Defendants' Reply memorandum, Sorrell v. IMS Health, Inc., No. 10-779, 2011 WL 2472796 (U.S. June 23, 2011), was decided after the initial moving papers were filed, but before Plaintiff filed his opposition. Plaintiff should have addressed Sorrell in his opposition, but did not.
- Sorrell clearly contemplates that the legal principles set forth in the opinion apply in the context of credit reporting and similar industries wherein data is sold. The Supreme Court in Sorrell states that "the creation and dissemination of information are speech within the meaning of the First Amendment" and specifically cites to Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 953 (1985), for the proposition that a "credit report is 'speech.'" Sorrell, 2011 WL 2472796, at *12.
- Under Sorrell, the legal standard which must be applied here is "heightened judicial scrutiny." Id. at *8-10, 12. Plaintiff, however, still fails to explain how his proposed interpretation of the FCRA passes the test set forth in Sorrell. Plaintiff does not dispute that his liability theory would impose a prior restraint and other burdens on the distribution of data, based upon the identity of the speaker (a "consumer reporting agency," rather than anyone else) and the content of the speech (potentially "adverse" to the consumer, rather than potentially favorable to the consumer). This liability theory violates Sorrell.
- Plaintiff's arguments relating to TransUnion Corp. v. FTC, 245 F.3d 809 (D.C. Cir. 2001), are both incorrect and duplicative of arguments made in his

Opposition. In addition to being superseded by Sorrell, FTC is out-of-circuit and thus not binding authority here. Moreover, as explained in Defendants' Reply (at 5-6), FTC is inapposite because there the data was neither publicly-available nor concerned a public matter. See FTC, 245 F.3d at 819. Here, by contrast, Defendants are being sued for transmitting data contained in public government records which is of great public interest.

- Defendants properly included a standing argument in their Reply to respond directly to arguments Plaintiff made in his Opposition. In any event, Plaintiff's lack of standing for each claim may be asserted at any stage in the proceedings, as this Court only has jurisdiction to entertain claims for which Plaintiff has standing. Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 117 (3d Cir. 1997) (standing is "perhaps the most important of jurisdictional doctrines") (citing FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 230, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)).
- In his proposed sur-reply, Plaintiff does not respond on the merits to Defendants' standing challenge. As explained in the Reply, the allegations of the Complaint, when read in conjunction with the complaint Plaintiff filed in the related (but dismissed) action against Pyromet and Lorgus, establish that there was no causal link between the alleged violation of Section 1681k and the damages alleged.
- Moreover, on the Section 1681e(b) claim, Plaintiff's failure to plead what Lorgus told Pyromet – given that Verifirst indisputably communicated only a question to Lorgus, rather than a "match" – establishes that no inaccuracy has been pleaded, and (even if inaccuracy were pleaded) breaks the chain of legal causation

because Plaintiff has not alleged concrete facts showing how the alleged inaccuracy actually resulted in his alleged denial of employment. Plaintiff does not meaningfully address this point in his proposed sur-reply either.

Accordingly, Defendants respectfully request that this Court deny Plaintiff's Motion, and instead grant Defendants' Motion to Dismiss the Complaint.

Dated: July 18, 2011

Respectfully submitted,

/s/ Bruce S. Luckman

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Dated: July 18, 2011

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